SUBJECT INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES AND REGULATIONS INVOLVED	3
STATEMENT	3
SPECIFICATIONS OF ERROR TO BE URGED	6
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	21
APPENDIX	23

LIST OF AUTHORITIES

CASES	PAGE
Brooklyn Savings Bank v. O'Neil, 65 S. Ct. 895, 324 U.S. 697	19
Commissioners of the State Ins. Fund v. United States, 72 F. Supp. 549 (D.C., N.Y., 1947)	20
Galveston H. & S. A. Ry. Co. v. Pigott, 116 S.W. 831 (Tex. Civ. App., 1909)	18
Galveston Ry. Co. v. Bean, 99 S.W. 721	18
Galveston Ry. Co. v. Mullen, 198 S.W. 409	18
Garrard, et al., v. Henderson, et al., 209 S.W. 2d 225 (Tex. Civ. App., 1915)	17
Gerald v. Standard Oil Co., 10 So. 2d 409	14
Honea v. Coca Cola Bottling Co., 183 S.W. 2d 968	14
Horton Motor Lines v. Currie, 92 F. 2d 164 (C.A. 4)	14
Korte v. New York, N. H. & H. Ry. Co., 191 F. 2d 86 (C.A. 2, 1951, cert. den.)	10
Levy v. Indemnity Ins. Co., 8 So. 2d 774	14
Mammoth Oil Co. v. United States, 275 U.S. 13, 48 S. Ct. 1	16
Marich v. United States, 84 F. Supp. 829 (D.C. Cal., 1949)	20
Maxwell v. United States, 141 F. 2d 139 (C.A. 7, 1944)	20
M. K. & T. Ry. Co. v. Flood, 70 S.W. 331, 79 S.W. 1106	18
Moran v. Pittsburgh-Des Moines Steel Co., 183 F. 2d 467	7
Oceanic Steam Nav. Co. v. Aitken, 25 S. Ct. 317, 196 U.S. 589	12
Pacific Ex. Co., et al., v. Watson, 124 S.W. 127 (Tex. Civ. App., 1909)	19
Palmer v. Hoffman, 318 U.S. 109, 63 S. Ct. 477	9

Pekelis v. Trans-Continental & Western Air, Inc., 187 F. 2d 122 (C.A. 2, 1951, Cert. Den.) 8
Peters, et al., v. Clements, 52 Tex. 140 (S. Ct., 1879) 18
Plunkett v. Union Electric Service, 36 So. 2d 704 14
Sands v. Curfman, 177 S.W. 161 (Tex. Civ. App., 1915) 17
Simpkins, et al., v. Searcy, et al., 32 S.W. 849 (Tex. Civ. App., 1895) 18
Stone v. Stone, 136 F. 2d 761 16
Texarkana National Bank v. Hubbard, 114 S.W. 2d 389 (Tex. Civ. App., 1938) 18
Texas & P. Ry. Co. v. Jones, 133 S.W. 744 (Tex. Civ. App., 1911) 18
Thompson v. Brown, 222 S.W. 2d 442 14
Uarte v. United States, 7 F.R.D. 705 20
United States v. Kesinger, et al., 190 F. 2d 529 (C.A. 10) 14
Watson, et al., v. Glenn, 82 S.W. 2d 704 (Tex. Civ. App., 1935) 17

UNITED STATES STATUTES

Federal Business Records Statute, 62 Stat. 945, 28 U.S.C., Sec. 1732 ..... 2, 3, 7, 9, 23
28 U.S.C., Section 1254(1) 2
1948 Revised Judicial Code, 28 U.S.C., Secs. 1346(b), 2671-2680 3

MISCELLANEOUS

Air Force Regulation 62-14 ..... 3, 23

TEXT

65 C. J. S. 17(a) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No._____

W. K. CHAPMAN, ET UX., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

W. K. CHAPMAN, ET UX., your Petitioners, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on March 8, 1952.

Opinions Below

The opinion of the United States District Court for the Southern District of Texas was in memorandum form and not reported (R. 283). The opinion of the Court of Ap-

peals for the Fifth Circuit (R. 300) affirming the judgment of the District Court is reported at 194 F. 2d 974.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit is dated March 8, 1952 (R.——). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

Questions Presented

1. Whether the Army Air Forces' Accident Investigation Report concerning the cause of the airplane accident prepared by employees of the United States is admissible in evidence as either an admission against the interest of the United States or as a record made in the regular course of business under the Federal Business Records Statute, 62 STAT. 945, 28 U.S.C., Sec. 1732.

2. Whether the exclusion from evidence of the Army Air Forces' Accident Investigation Report, which found the cause of the accident to be the result of the pilot's "poor judgment" in various aspects, was *harmless error* although not discredited in any way, and which report supported all elements of Petitioner's case.

3. Whether the rule of res ipsa loquitur, pleaded in the alternative by Petitioners, is applicable under the Tort Claims Act to an airplane accident, where the undisputed facts disclosed (a) the airplane to be in the exclusive custody and control of the servants and employees of the United States acting within the scope of their employment for the benefit of the United States, and (b) a flight of the airplane undertaken resulting in a crash killing all on board, the exact cause of the accident being unknown to Petitioners but within the knowledge of the servants and employees of the United States.

4. Whether Petitioners satisfied their burden of proof of negligence and thus whether the action of the United States District Court in failing to find negligence was clearly erroneous and unjustified where the undisputed facts disclosed (a) the failure of the pilot to land the airplane at the nearest available airport after experiencing engine and equipment failure, and thereafter, (b) the failure of the pilot to land the airplane on the nearest available runway (the runway in use) at the New Orleans Municipal Airport, and (c) the attempted maneuvering of the malfunctioning airplane by the pilot while over the New Orleans Municipal Airport resulting in the subsequent spin and crash of the airplane.

5. Whether a release instrument relieving the United States of all liability for negligence and allegedly executed by the deceased minor, and one of the Petitioners herein, is unenforceable.

Statutes and Regulations Involved

The pertinent provisions of the Federal Business Records Statute, 62 STAT. 945, 28 U.S.C., Sec. 1732, and Air Force Regulation 62-14 are set forth in the Appendix at pp. 23-27.

Statement

Petitioners (Plaintiffs below) brought this action against the United States of America in the United States District Court for the Southern District of Texas under the Tort Claims Act, as amended,[1] in which Petitioners sought damages for the death of their minor son, Walter Kyle Chapman, Jr., resulting from the crash of an airplane of the United States Army Air Forces. The deceased, Walter Kyle Chapman, Jr., a civilian, was aboard the airplane as a pri-

[1]1948 Revised Judicial Code, 28 U.S.C., Secs. 1346 (b), 2671-2680.

vate in the Civil Air Patrol. The answer (R. 27, 44) pleaded unavoidable accident and the defense of a release allegedly executed both by the minor and his father, one of the Petitioners here, prior to the flight.

The basic facts are undisputed. The airplane involved was an Air Force T-7 type, being a two-engine Beechcraft. Four passengers (including Chapman) in addition to the pilot and co-pilot were aboard the airplane when it departed Ellington Air Force Base near Houston, Texas, for the New Orleans Municipal Airport at approximately 12:30 P.M., on September 12, 1948. At 2:37 P.M. the pilot contacted the New Orleans Station by radio and reported that he was fifteen miles South of Baton Rouge at 2000 feet elevation and was encountering bad weather and overcast. At 3:11 P.M. the pilot again radioed that he was approximately ten miles out of New Orleans but unable to determine his position, stating that his radio receiver was not operating. At 3:24 P.M. he radioed that he was at an elevation of 750 feet, that one engine was not operating and that he was in a state of emergency and would land at the first field available. Upon receipt of this message, the New Orleans Station alerted all other fields in the vicinity. At 3:32 P.M. the pilot reported that he was coming down the edge of Lake Pontchartrain with one engine out and the remaining engine running rough. A notation attached to this message noted that the first field would probably be the Naval Auxiliary Field (R. 285). The airplane was observed about one mile to the West of the Naval Field at an approximate altitude of 200 feet (R. 50). The Control Tower at the Naval Field immediately gave the airplane a green light, indicating that it should land (R. 51). The pilot of the airplane failed to respond to the green light and passed the Naval Field at a distance of approximately one-half mile (R. 52).

After passing the Naval Field, the airplane approached the New Orleans Municipal Airport which was several miles distant. The airplane was then directly lined up with Runway 9 of the New Orleans Municipal Airport, which was the Runway in use at the time. Control Tower personnel of the New Orleans Municipal Airport promptly gave the pilot a green light, signaling him to land immediately. There was no response by the pilot. Instead, the pilot made a turn to the right at an altitude of approximately 200 feet proceeding to make a traffic pattern to attempt to land on Runway 36. The Tower personnel at the airport again flashed a green light which was finally acknowledged by the blinking of the airplane's landing lights. The pilot then attempted to executed a left turn to align the airplane with Runway 36, and at the same time endeavored to lower the landing gear (R. 250, 286). At this point, the airplane lost flying speed went into a tail spin, crashed and burned (R. 286). All aboard the airplane, including Walter Kyle Chapman, Jr., were killed and the airplane was completely destroyed by fire (R. 283, 286).

During the course of the trial, Petitioners (Plaintiffs below) offered in evidence (R. 250) the Army Air Forces' Accident Investigation Report which was excluded by the Trial Court upon the objection of the Government that the Report consisted only of opinions and conclusions based upon hearsay (R. 251, 290). The Government however offered in evidence certain selected documents from the Report which were received by the Court over Petitioner's objection and insistence to admit the *entire* report (R. 97, 124-126, 171-173, 254). The District Court held that Petitioners failed to prove negligence and were further precluded from any recovery by the alleged release (R. 290). Upon appeal to the Court of Appeals for the Fifth Circuit, the judgment was affirmed (R. 309), the Court holding

that the Accident Report was inadmissible and that Petitioners had failed to discharge their burden of proof of negligence.

At the time of his death young Chapman was a private in the Civil Air Patrol, with orders to proceed on a navigational training flight from Ellington Air Base to New Orleans, and return (R. 68, 283). The Civil Air Patrol is a civilian volunteer organization and auxiliary of the United States Air Forces established as such by Act of Congress.[2]

Specifications of Error to be Urged

The Circuit Court in affirming the judgment of the District Court erred:

1. In holding that the Accident Report was not admissible in evidence as either admissions against interest or regular business entries within the terms of the FEDERAL BUSINESS RECORDS STATUTE, 28 U.S.C., Sec. 1732.

2. In holding that the exclusion of the Accident Report was "harmless error."

3. In holding that the doctrine of "Acts in emergency or Sudden Peril" is applicable to this type of airplane accident case.

4. In failing to apply the doctrine of res ipsa loquitur.

5. In holding that Petitioners (Plaintiffs below) did not satisfy their burden of proof of negligence.

6. In failing to find that the alleged release instrument was unenforceable.

Reasons For Granting The Writ

The decision below should be reviewed because it erroneously interprets the Tort Claims Act so as to thwart the

[2] 5 U.S.C., Sec. 626 (1); 36 U.S.C., Secs. 201-208.

legislative policy which it was designed to effectuate. The decision below is in conflict with those of other Federal Courts and it concerns matters of public policy and issues of far reaching importance which this Court should decide.

1. In holding that the Army Air Forces Board's Report of Aircraft Accident was not admissible in evidence, the United States District Court and Court of Appeals below have decided a question of Federal law which is in direct conflict with decisions of other Circuit Courts on the same matter. The Accident Report is an official report of the Army Air Forces Aircraft Accident Investigation Board regarding the accident here in question, comprised of a number of statements, reports, diagrams and other documents bound together under one seal. It sets forth the causes of the accident and the Board's opinion that the pilot exercised poor judgment and technique in numerous aspects (R. 289), thus supporting all important elements of Petitioners' case. The entire document is under the seal of the Department of the Air Forces and is set forth on War Department AAF Form 14 termed "Army Air Forces Report of Major Accident" together with attachments, all being made pursuant to Air Force Regulation 62-14 (set out in the Appendix). The decision of the Court of Appeals below in excluding the report is based upon an interpretation of the Federal Business Records Statute. 62 STAT. 945, 28 U.S.C., Sec. 1732 (set out in the Appendix, infra).

The holding by the Court below is squarely opposed to that rendered by the Third Circuit Court in the case of MORAN V. PITTSBURGH-DES MOINES STEEL COMPANY, 183 F. 2d 467, wherein an action was instituted for accidental death caused by the explosion of a gas storage tank designed and constructed by Defendants therein. There was offered in evidence a report by the United States Bureau of Mines which had been signed by five Bureau experts who made

their own investigation and who had concluded that the tank disintegrated rather than exploded. The conclusions of the Board supported important elements of the Plaintiff's case. The Third Circuit Court held that the report of the explosion was a record of occurrence or event and was part of the "business" of the Bureau thus making the report admissible under the Federal Statute relating to admissibility of records made in the regular course of business. That Court stated as follows:

> "The report is no less admissible because it contains conclusions of experts which are based upon hearsay evidence as well as upon observation. These circumstances, by virtue of express statutory provision, go to weight rather than to admissibility. Moreover, this Court has several times held that hospital records are admissible under the statute, and certainly medical diagnosis is no less a matter of opinion based upon observation and perhaps hearsay than this report of the Bureau's investigation. Bartkoski v. Pittsburgh & Lake Erie R. Co., 3 Cir., 1949, 172 F. 2d 1007; Norwood v. Great American Indemnity Co., 3 Cir., 1944, 146 F. 2d 797; Pollack v. Metropolitan Life Insurance Co., 3 Cir., 1943, 138 F. 2d 123."

This precise point was recently considered in the case of PEKELIS v. TRANS-CONTINENTAL & WESTERN AIR, INC., 187 F. 2d, 122 (C.A. 2, 1951, Cert. Den.) wherein the Circuit Court came to a conclusion diametrically opposed to that reached by the Fifth Circuit Court below. The suit was by a wife against the airline to recover damages for the accidental death of her husband killed in a crash while a passenger aboard Defendant's airplane. Reports of the accident were made by various agencies, including the Regional Accident Investigating Board, the Civil Aeronautics Authority, the Civil Aeronautics Board and the

TWA Regional Board. In its opinion, the Second Circuit Court held that all of the accident reports offered by Plaintiff should have been admitted either as admissions of the Defendant corporation or under the Federal Business Records Statute, 28 U.S.C., Sec. 1732 (set out in the Appendix, infra). In regard to the reports of the accident, the Circuit Court stated as follows:

> "* * * We think that the reports were all admissible *in toto*. Indeed, it would seem to be impossible to disentangle the conclusions from the facts on which they were based. Moreover, out of fairness to both parties the jury should have been able to consider all of the reports as a whole. The fact that they were based on hearsay and expressed opinions would go to their credibility rather than to their admissibility."

The Second Circuit Court's interpretation of this Court's opinion in PALMER v. HOFFMAN, 318 U.S. 109, 63 S. Ct. 477, is directly opposed to that placed upon it by the Court of Appeals below. The Second Circuit Court stated (and we submit, correctly) as follows:

> "It was this consideration, we believe, that led the Supreme Court to say that the reports in *Palmer v. Hoffman*, supra, were not business entries within the meaning of the statute for the reason that 'Their primary utility is in litigating, not in railroading.'
>
> "The reports in the case at bar were against the interest of the entrant when made, since they charged serious fault on the part of employees Best and Langsdale, and whether or not completely accurate were clearly not part of a story cooked up in advance of litigation in the disguise of business records. Moreover, it is not the entrant who here sought to introduce the reports, but the plaintiff, and this too tends to show that they were not contrived by the entrant for litigation.

> *Palmer v. Hoffman* was given the above interpretation by this court in *United States v. Moran*, 151 F. 2d 661, 662, and *Lopoczyk v. Chester A. Poling, Inc.*, 152 F. 2d 457, 460, note 4. We hold that Palmer v. Hoffman, did not preclude the reception under the business entry statute of the reports offered in the case at bar."

Still another conflicting Circuit Court opinion is that of KORTE v. NEW YORK, N. H. & H. RY. CO., 191 F. 2d 86 (C.A. 2, 1951, cert. den.), wherein the Court held that doctors' reports in the form of letters were admissible. The Court of Appeals below cites only the dissenting opinion in this case in order to justify its holding (R. 309).

2. Moreover, the Court below in finding that the exclusion of the accident report, if error, was harmless error (R. 308) has committed prejudicial error which contributes to the injury of the substantial rights of Petitioners. The accident report, if admitted, carefully examined and viewed in its most favorable light would have justified and required a different conclusion on the matter of negligence.

Although apparently given scant attention by either Court below, the accident report was before both the United States District Court and the Court of Appeals (R. 308) due to the fact that when Respondent introduced in evidence selected pages of the report, it could not separate them from the remainder thereof, same being under one document and seal (R. 172-173). Yet, the accident report not only verfied certain factual data already in evidence, it further set forth the opinions and conclusions of the Board to the effect that the primary cause of the accident was adjudged to be the exercising of poor judgment on the part of the pilot (R. 289) in (a) failing to land at the first airport available to him (Naval Air Field), in (b) failing to land on the runway with which he was directly aligned when approaching the New Orleans Municipal Airport, in (c) electing to fly

a regular flight pattern around the airport on only one engine, heavily loaded and in (d) failing to maintain sufficient air speed for a safe landing. The report further stated that *pilot technique* was the secod main cause of the accident in that traffic pattern was flown at a very low air speed and nose high attitude, a stalling turn was made into a dead engine upon a final approach, with no attempt made to lower the nose of the airplane in order to offset the stalling effects of lowing the gear prior to landing.

Despite the availability of the foregoing evidence, the Court of Appeals below made the following statement (R. 302):

> "We think it clear, indeed it is hardly contended otherwise, that there is ample evidence from which a reasonably adequate picture of the flight from its very beginning until shortly before its sudden and fatal ending may be drawn, and that in that picture no proof of negligence appears. The last critical moments of the flight, as time and tide go in a plane which, though still airborne, is in desperate plight, must, however, remain forever shrouded behind the impenetrable curtain which death has drawn. This curtain neither investigators, nor boards, nor even judges can pierce, except by speculation and conjecture, and these may not take the place of proof. Since knowledge must precede understanding, and understanding must precede judging, and we cannot know, we cannot judge what was done by the pilot that he ought not to have done, what was left undone by him that he ought to have done, it is, *we think, fatal to plaintiffs' claim that they were unable to discharge their burden of proof by presenting evidence as to what in those critical moments was happening to and within the plane.*"

The Court of Appeals below has then stated that while there was ample evidence giving an adequate picture of the

flight, the actual cause of the accident must remain undetermined because of the curtain of death. *Under such a construction of the law, the Court of Appeals has forever precluded any finding of negligence in an airplane accident case where all persons on board are killed.*

It is common knowledge that a military pilot is trained to cope with emergencies as may arise while flying an airplane and which may be reasonably anticipated. It becomes incumbent upon him to exercise his judgment while engaged in the mechanics of a flight, and in this sense a pilot may be considered an expert. But to say one so engaged cannot be negligent while exercising "poor judgment" is conflicting with a decision of this Court, speaking through Mr. Justice Holmes, in the case of OCEANIC STEAM NAV. CO. v. AITKEN, 25 S. Ct. 317, 196 U.S. 589, as follows:

> "It is quite true that negligence must be determined upon the facts as they appeared at the time * * * but it is a mistake to say, as the petitioner does, that if the man on the spot, even an expert, does what his judgment approves, he cannot be found negligent. The standard of conduct, whether left to the jury or laid down by the court, is an external standard, and takes no account of the personal equation of the man concerned. The notion that it 'should be co-extensive with the judgment of each individual' was exploded, if it needed exploding, by Chief Justice Tindal, in Vaughan v. Menlove * * * "

The Court of Appeals below further applied the doctrine of "Acts in Emergency or Sudden Peril" to the facts of the instant case (R. 307). This doctrine is founded upon the theory that a person who omits to act in the most judicious manner because of want of time in which to form a judgment is not chargeable with negligence. The doctrine is usually applied to automobile cases. The Court below has

thus decided an important question of Federal law within the Tort Claims Act, which has not been but should be settled by this Court, under which the doctrine of "Acts in Emergency" may be uniformly applied to all cases of airplane accidents, thereby precluding any possible finding of negligence. The very act of flying an airplane demonstrates otherwise.

It is a matter of common knowledge that most anything out of the ordinary that happens to an airplane in flight is to some degree an emergency. Often a pilot is required to act quickly in cases of engine or radio trouble, which might reasonably be anticipated, and he should act with the care of a man trained to meet just such situations. These principals, supported by full authority, are clearly set forth in 65 C. J. S., 17 (a) Negligence, as follows:

> "* * * A mere necessity for quick action does not constitute an emergency within the rule where the situation or the danger calling for such action is one which should reasonably have been anticipated and which the person charged with negligence should have been prepared to meet."
>
> "* * * and if one's conduct did not measure up to the standard of ordinary care under the circumstances in which he found himself he is chargeable with negligence notwithstanding the existence of the emergency. In this connection his conduct is not necessarily to be judged according to the circumstances as they appeared to him, and the proper test is how the circumstances ought to have appeared to him in the exercise of reasonable care."

The pilot in the instant case had ample time in which to determine the best course to pursue. Having already encountered trouble, at 3:24 P. M. he reported that he was operating on only one engine, was in a state of emergency,

and would land at the first field he came to (R. 285). From then on every second counted. But the accident did not occur until some twenty (20) minutes thereafter at 3:43 P. M. The pilot thus had sufficient opportunity for full exercise of judgment, and was not in the position of one who is suddenly confronted with a totally unforeseen peril which left no time for deliberation. HORTON MOTOR LINES v. CURRIE, 92 F. 2d 164 (C.A. 4).

3. By failing to apply the rule of res ipsa loquitur to this case of aircraft accident, when all requirements of the rule were fully satisfied, the United States District Court below decided a question of law in direct conflict with the decisions of other Circuit Court of Appeal on the same matter, and has decided a question of Federal law under the Tort Claims Act which has not been but should be settled by this Court.

Petitioners plead the doctrine of res ipsa loquitur in the alternative (R. 11). In both the States of Texas and Louisiana, it is held to be a rule of evidence and is not precluded by the further pleading of specific act of negligence,[3] nor are Petitioners precluded from the benefit of evidence favorable to them introduced by the Government (UNITED STATES v. KESINGER, infra).

In not applying the doctrine of res ipsa loquitur, the District Court below reached a decision sharply inconsistent with that of UNITED STATES v. KESINGER, ET AL., 190 F. 2d 529 (C.A. 10) which involved the crash of an Army Air Forces' airplane. An action was brought against the United States under the Tort Claims Act. Similar to the facts of the instant case, the Court found the Army airplane to be in the exclusive custody and control of the servants and

[3] Texas: **Honea v. Coca Cola Bottling Co.**, 183 S.W. 2d 968; **Thompson v. Brown**, 222 S.W. 2d 442; Louisiana: **Gerald v. Standard Oil Co.**, 10 So. 2d 409; **Levy v. Indemnity Ins. Co.**, 8 So. 2d 774; **Plunkett v. Union Electrical Service**, 36 So. 2 704.

employees of the United States acting within the scope of their employment; that a flight of the airplane was undertaken resulting in a crash and consequent destruction of farm buildings; that the employees of the United States had the best opportunity of ascertaining the cause of the accident and that Plaintiffs therein did not know and could not readily ascertain and establish same by proof. The Tenth Circuit Court after a thorough review of all pertinent cases on the matter (which are cited in the footnotes of the opinion) held the rule of res ipsa loquitor applicable stating as follows:

> "The modern trend of authority is to hold the rule of res ipsa loquitur applicable to airplane accidents, and we hold that it was applicable under the facts and circumstances presented in the instant case."

4. In holding that Petitioners failed to satisfy their burden of proof of negligence, the Court of Appeals below has decided a question of both Federal and State law that is untenable and which departs from the usual and accepted course of judicial findings so as to call for an exercise of this Court's power of supervision. Petitioners (Plaintiffs below) were at a disadvantage in the trial of the case before the United States District Court because all matters concerning the accident were peculiarly within the knowledge of the Government as a result of its investigation.

The undisputed facts (R. 285-286) show that the pilot (a) ignored a signal to land and thereafter failed to land at the Naval Field, (b) ignored a signal to land and thereafter failed to land on the runway with which he was aligned (the runway in use) at the New Orleans Municipal Airport and (c) attempted to maneuver the malfunctioning airplane while over the New Orleans airport resulting in the subsequent spin and crash of the airplane.

Evidence of the above facts was in the nature of depositions, documentary evidence and certain parts of the accident report which were admitted in evidence. This Court is then in as good a position as was the District Court and Court of Appeals to determine the credibility of such evidence and thus to determine whether a finding of "no negligence" is clearly erroneous and unjustified. The force of such evidence adduced at the trial being undisputed is greatly increased by the failure of Respondent to rebut it, especially when Respondent had the means to do so. The rule in the Federal Courts, as adequately expressed by the Court of Appeals for the District of Columbia in the case of STONE v. STONE, 136 F. 2d 761, is that a Court will not disregard positive evidence uncontradicted and not inherently improbable; that uncontroverted evidence involving plain, simple facts capable of contradiction must ordinarily be accepted as true, when not incredible in itself, nor impeached nor discredited in any way. In this regard, it was stated in the STONE case as follows:

> "* * * to hold otherwise would vest triers of the facts in cases subject to review with authority to disregard the rules of evidence which safeguard the liberty and estate of the citizen."

This Court has found that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted. MAMMOTH OIL CO. v. UNITED STATES, 275 U.S. 13, 48 S. Ct. 1.

5. In holding that the alleged release instrument precluded recovery by Petitioners, the United States District Court decided an important question of Federal law under the Tort Claims Act which should be settled by this Court and

a question of local law in a way in conflict with all applicable local Texas decisions. Respondent relied upon a release instrument allegedly executed by the deceased, Walter Kyle Chapman, Jr., and his father, one of the Petitioners herein, under the terms of which the United States attempted to relieve itself of all liability for damages in the event of injury or death to young Chapman (R. 27-30).

The United States District Court admitted in evidence a copy of such release instrument with all signatures typed thereon and held the release as binding and enforceable so as to preclude recovery by Petitioners (R. 290-294). The Court of Appeals did not consider it necessary to rule on this issue in view of its affirmance of the District Court's finding regarding negligence (R. 309).

The alleged execution of the release was a separate transaction done sometime prior to the flight in question and before the tort occurred. The release was purportedly executed in the State of Texas and the flight was partially performed in said State, thus the laws of the State of Texas were considered applicable insofar as a construction of the release provisions were concerned.

Walter Kyle Chapman, Jr., was eighteen (18) years of age at the time he was killed (R. 283). The following principles of law are well settled in the State of Texas:

(a) A minor is not liable on his contract and his contract is voidable at his election. GARRARD, ET AL. v. HENDERSON, ET AL., 209 S.W. 2d 225 (Tex. Civ. App. 1948); SANDS v. CURFMAN, 177 S.W. 161 (Tex. Civ. App. 1915); WATSON, ET AL. v. GLENN, 82 S.W. 2d 704 (Tex. Civ. App. 1935).

(b) An act of disaffirmance by the minor must be done within a reasonable time after reaching majority, and the right to disaffirm has been extended to the minor's legal repre-

sentatives and heirs. SIMPKINS, ET AL. V. SEARCY, ET AL., 32 S.W. 849 (Tex. Civ. App. 1895).

(c) A release must be supported by some valid consideration to be binding. PETERS, ET AL. V. CLEMENTS, 52 Tex. 140 (S. Ct. 1879); TEXARKANA NATIONAL BANK V. HUBBARD, 114 S.W. 2d 389 (Tex. Civ. App., 1938); TEXAS & P. RY. CO. V. JONES, 133 S.W. 744 (Tex. Civ. App., 1911). This point of law is clearly demonstrated in GALVESTON H. & S. A. RY. CO. V. PIGOTT, 116 S.W. 831 (Tex. Civ. App., 1909), wherein it was held that a contract whereby parents consented to their son's employment and waived all claims they might have for damages for his death or injury in the line of his employment was without consideration. The Court made the following statement:

> "It would seem an enormity to sanction a contract which exempts one from liability for the death of a human being which he has brought about by his one negligence. * * *
>
> "Under the contract the consideration recited is no consideration at all. The parents waived everything * * * their right to recover their son's wages, as well as their right to recover damages, vouchsafed them by the law, in the event he was killed or injured while in the employment of the Company—and got nothing in the world except the piece of paper upon which the alleged contract was written."

Further, it has been established in Texas that a common carrier is liable for injuries sustained to one riding a free pass although containing a release of liability. M. K. T. RY. CO. V. FLOOD, 70 S.W. 331, 79 S.W. 1106; GALVESTON RY. CO. V. BEAN, 99 S.W. 721; GALVESTON RY. CO. V. MULLEN, 198 S.W. 409.

Contracts for exemption from liability for future negligence are not favored and are held void by many authorities,

particularly where a legal or public interest is involved and where there is personal injury or death. (17 C. J. S., Contracts, Sec. 262). In Texas, the law is clear that an agreement by a parent, as an inducement to the employment of a minor child, to hold the employer harmless for any injury to the child occasioned by the employer's negligence, is contrary *to public policy and void*. PACIFIC EX. CO., ET AL. v. WATSON, 124 S.W. 127 (Tex. Civ. App., 1909).

This Court has declared itself on the point in the case of BROOKLYN SAVINGS BANK v. O'NEIL, 65 S. Ct. 895, 324 U.S. 697, wherein this Court reviewed an action to recover unpaid overtime compensation, liquidated damages and attorney's fees under the Fair Labor Standards Act. The Petitioner tendered Respondent $500 for wages due and owing under the Act, and the latter accepted the money and signed a general release of all claims against the Petitioner. Thereafter, Respondent successfully sued for the statutory balance due him under the act. This Court made the following statement:

> "It has been held in this and other courts that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy. Mid-State Horticultural Co. v. Pennsylvania Railroad Co., 320 U.S. 356, 361; 64 S. Ct. 128, 130, 88 L. Ed. 96; A. J. Phillips Co. v. Grand Trunk Western Ry., 236 U.S. 662, 667, 35 S. Ct. 444, 446, 59 L. Ed. 774, Cf. Young v. Higbee Company, 324 U.S. 204, 65 S. Ct. 594. Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate."

The legislative policy established by the Congress in passing the Tort Claims Act under which Petitioners herein brought their action had as its purpose the securing to certain individuals the *right* to sue the United States with the right of recovery against the United States in money damages for personal injury or death caused by the negligence or wrongful act or omission of any employee of the Government while acting within the scope of his office.

A provision is contained in the release instrument which specifically exempts a statutory right (third paragraph) which reads as follows (R. 291-292):

> "The execution hereof does not operate to waive any statutory right conferred by Act of Congress."

It is submitted that the foregoing paragraph specifically removes Petitioners from the effects, if any, of the release, since Petitioners' suit is based *solely* upon a statutory *right* conferred by Act of Congress, i.e., the Tort Claims Act. The Tort Claims Act creates both a right and a remedy. COMMISSIONERS OF THE STATE INS. FUND v. UNITED STATES, 72 F. Supp. 549 (D.C., New York, 1947); UARTE v. UNITED STATES, 7 F.R.D. 705; MAXWELL v. UNITED STATES, 141 F. 2d 139 (C.A. 7, 1944); MARICH v. UNITED STATES, 84 F. Supp. 829 (D.C. Cal., 1949).

The questions presented by this case are of great and recurring significance in the administration of the Tort Claims Act. The serious questions of *public policy* involved here and the effect of the decisions below, if unreversed, makes this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

W. K. CHAPMAN, ET UX.,
Petitioners

By
JACK K. AYER,
801 C and I Life Bldg.,
Houston, Texas,
Counsel for Petitioners

STONE WELLS,
Houston, Texas,
Of Counsel